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Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 319

PITTSBURGH TOWING COMPANY

v.

MISSISSIPPI VALLEY BARGE LINE COMPANY, ET AL.

Appeal from the United States District Court for the Eastern District of Missouri—Eastern Division

PETITION FOR REHEARING OF PER CURIAM DECISION AND JUDGMENT DISMISSING APPEAL

ERNEST L. KEATHLEY
818 Olive Street
St. Louis, Mo.

ERNIE ADAMSON
Box 62
Middleburg, Virginia
Attorneys for
Petitioner-Appellant.

Due December 2nd, 1966

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITION FOR REHEARING

Now come Counsel for petitioner-appellant, and respectfully petition this Honorable Court to grant rehearing and reconsideration of its per curiam decision granting appellees motion to dismiss the above-entitled appeal on November 7, 1966.

1. This petition is presented in good faith and not for the purpose of delay. No prior application has been made to this Court for the relief now sought herein. Co-counsel for appellant in St. Louis, Missouri, is Ernest L. Keathley, who handled the filing of notice of appeal, application for a stay pending appeal and all other proceedings in the District Court for the Eastern District of Missouri relating to the above-entitled appeal. Annexed hereto and made a part hereof is an affidavit of co-counsel Keathley, duly verified on November 18, 1966 and marked Exhibit A. Annexed to the said affidavit are fourteen (14) sheets consisting of true copies of relevant documents and marked Exhibits A-1 thru A-6. The original affidavit will be delivered to the Clerk of Court.

2. Some confusion concerning this appeal and stay of judgment developed at the office of the Secretary of the Interstate Commerce Commission. When the opinion of the Court below was served, this Counsel made inquiry at the Commission as to the filing of a notice of appeal by the Commission, which action would have made a request for a stay in behalf of this appellant unnecessary.

3. Counsel was informed at the Commission that until judgment was entered, no conference would be appropriate. After judgment was entered Counsel requested the Secretary's office to permit inspection and publication of any official minutes of the Commission relating to this case. Such right of publication is provided for in U.S.C. Section 17(3) Title 49. The official minute clerk for the Commission (Mr. Frank Cambron) refused the request and referred Counsel to his superior, the Secretary. After some delay, Counsel contacted Secretary Garson who refused to publish or

permit inspection of the official minutes. The Commission appointed Mr. A. Neal Garson as Secretary shortly after he had appeared in the Court below in this proceeding, as appears in the transcript of record. Mr. Garson was familiar with this case.

4. This Counsel did not see any official record of action by the Commission in this proceeding until May 5th, 1966, when an order was released, dated March 18th, 1966. (See Exhibit A-5). It now appears that the Secretary presented the above-mentioned order to the Commission for adoption seven days before the judgment was entered in the Court below, and then withheld service thereof for forty-eight days while this Counsel sought information as to the status of the proceeding. Concealment by the Secretary of these official acts of the Commission was a substantial cause of delay in perfecting this appeal.

5. It also appears that on March 18th, 1966 an action was taken (see Exhibit A-6), concerning the decision not to appeal. No such order or notice was served at any time and this Counsel actually saw this extract of minutes for the first time when it appeared annexed as an exhibit to the motion to hold the Commission in contempt, June 20th, 1966. (See Exhibit A-4). On or about May 20th, 1966, Counsel Keathley was requested to apply for a stay of judgment. We could not wait longer to apply for a stay.

6. Counsel do not feel that they were negligent in perfecting and prosecuting this appeal. Rather they were caught in a web, not of their own making, but nevertheless creating a dilemma. On June 15, 1966 Mr. Keathley was still waiting for action on his motion by the Court below.

7. The dissent by Mr. Justice Black, in our opinion, is well founded in law and common sense. The administration of justice is the true objective of all laws. The questions presented in this appeal are important and substantial.

8. Attention of the Court is directed to the fact that on settlement of the stay order of the Court, dated June 24th, 1966, no objection was raised by opposing Counsel as to timeliness. We cannot say just what opposing Counsel had in mind when they agreed to the stay order. Failure to raise such objection to procedural matters, which objection could or should have been raised at that time in the Court below, in our opinion, should not be heard on appeal. Otherwise the doors to entrapment might be left wide open. If there was delay in this proceeding, it was not ours.

Counsel for petitioner-appellant respectfully pray that this Honorable Court waive the unintentional breach of its Rule 13(1), vacate its prior action, and proceed to determine and adjudicate the questions in issue on this appeal.

Respectfully submitted,

ERNEST L. KEATHLEY
818 Olive Street
St. Louis, Mo.

ERNIE ADAMSON
Box 62
Middleburg, Virginia
Attorneys for
Petitioner-Appellant.

Dated Nov. 29, 1966

Certificate

I, Ernie Adamson, of Counsel for Petitioner, do certify that the foregoing petition for rehearing, in Appeal No. 319, decided November 7, 1966, is filed in good faith and not for the purpose of delay.

ERNIE ADAMSON

November 29, 1966.

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EXHIBIT A

STATE OF MISSOURI }
CITY OF ST. LOUIS } ss

AFFIDAVIT

Ernest L. Keathley, being first duly sworn, deposes and states as follows:

That he is one of the attorneys of record in the matter of Pittsburgh Towing Company vs. Mississippi Valley Barge Line et al., being Cause No. 319 in the Supreme Court of the United States, October Term 1966.

That Notice of Appeal to the Supreme Court was filed April 15, 1966, from the Order, Judgment and Decree of the three-Judge District Court for the Eastern District of Missouri—Eastern Division.

That Motion for stay of execution of the District Court's Order, Judgment and Decree was filed in the District Court June 3, 1966; that objections were made to said Order as submitted with respect to the form and language of certain portions thereof; that because of the absence from the city on judicial business of Hon. Roy W. Harper, presiding Judge of the United States District Court for the Eastern District of Missouri, affiant was not able to obtain order directing stay of execution signed by each of the three judges until June 24, 1966;

That record on appeal was transmitted to the Clerk of the Supreme Court of the United States June 10, 1966, which record did not include the Court order of June 24, 1966, directing stay of execution pending final disposition of this case on appeal, the same being transmitted as supplemental record on June 28, 1966.

That affiant conferred on several occasions with attorneys for Plaintiffs Mississippi Valley Barge Line Company et al., Appellees herein, and also conferred on several oc-

casions with attorneys for United States of America; that said attorneys agreed in substance to the requested stay of execution, if the form and language thereof were modified in the manner that they demanded, and that said stay of execution was approved by the Interstate Commerce Commission and the United States of America, acting through the Office of the Department of Justice, with the changes requested by the Interstate Commerce Commission and which changes were incorporated in the Court order of June 24, 1966. Letter from Mrs. Betty Jo Christian, Attorney for Interstate Commerce Commission, Washington, D. C., dated June 22, 1966, addressed to Hon. Richard D. Fitz-Gibbon, Jr., United States Attorney for the Eastern District of Missouri, St. Louis, Missouri, is annexed hereto.

That on June 17, 1966, attorneys for Plaintiffs-Appellees, Mississippi Valley Barge Line Company et al., filed in the United States District Court for the Eastern District of Missouri—Eastern Division, their Motion to require Defendant Interstate Commerce Commission to show cause why it should not be cited in contempt, with notice of hearing of said Motion July 1, 1966, at ten o'clock a.m., as evidenced by copy of letter and copy of said Motion and Notice annexed hereto; that thereafter, to-wit: on June 29, 1966, said Plaintiffs-Appellees, through their attorneys of record, withdrew said Motion to require the Interstate Commerce Commission to show cause why it should not be held in contempt as per written withdrawal of Motion annexed hereto.

That failure of appellant's attorneys to apply for an enlargement of time within which to perfect and docket said appeal was occasioned through inadvertence and misunderstanding between appellant's attorneys of record as to the duties of each with respect to the matter of perfecting the appeal, and was not the result of intentional or willful neglect or refusal to comply with the applicable rules of the Supreme Court of the United States.

That this affidavit is made for the purpose of explaining and showing to the Court that said failure to comply with the Court rules was unintentional and not for the purpose of hindering, delaying or impeding final disposition of the case on its merits.

Dated at St. Louis, Missouri, November 18, 1966.

/s/ ERNEST L. KEATHLEY
Ernest L. Keathley

Subscribed and sworn to before me this 18th day of November, 1966.

/s/ JOSEPH WALL
Notary Public

My Commission expires:
Sept. 27, 1967

EXHIBIT A-1

INTERSTATE COMMERCE COMMISSION
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D. C. 20423

BJC:scl
June 22, 1966

AIR MAIL

Richard D. Fitzgibbon, Jr., Esq.
United States Attorney
Eastern District of Missouri
St. Louis, Missouri

Attention: John A. Newton, Esq.
Assistant U.S. Attorney
Re: Mississippi Valley Barge Line Co.
v. United States,
Civil Action No. 64 C 3(1),
E.D. Mo., E. Division
(G. C. File No. 1917)

Dear Mr. Fitzgibbon:

Mr. Ernest L. Keathley, counsel for Pittsburgh Towing Company, an intervening defendant in the above-styled proceeding, has requested that I inform you of the Commission's position concerning Pittsburgh Towing's motion for a stay pending appeal.

The Commission has unanimously voted not to appeal the district court's decision to the Supreme Court. I am authorized to state that the Department of Justice has also decided not to appeal the decision. However, we have no objection to a stay of the judgment pending completion of Pittsburgh Towing's appeal.

It is our understanding that the plaintiffs, Mississippi Valley Barge Line Co., et al., have requested that a condition be incorporated in any stay which may be issued to

provide that, pending appeal, no party to the proceeding shall take any action with respect to the subject matter of this proceeding other than the prosecution or defense of the appeal. The Commission has no objection to such a condition.

In our opinion, however, the form of the stay order presented by Pittsburgh Towing is not appropriate. The proposed order would provide that the judgment of the Court be "set aside, vacated, annulled and suspended, pending final disposition of this case on appeal to the Supreme Court of the United States." We suggest that a more appropriate provision would be that the judgment is "stayed pending appeal to the Supreme Court of the United States."

In addition, we note that the proposed order is drafted for the signature of a single district judge. Under Rule 62(c) of the Federal Rules of Civil Procedure, a stay pending appeal of a judgment of a three-judge district court can only be made:

> * * * (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

We would appreciate your informing the Court of our position.

Copies of this letter are being sent to all counsel of record.

Yours truly,

(Mrs.) Betty Jo Christian
Attorney

cc: John H. D. Wigger, Esq.
Attorney
Department of Justice
Washington, D. C.

Ernie Adamson, Esq.
Aspen Hill
Middleburg, Virginia

Ernest L. Keathley, Esq.
818 Olive Street
St. Louis, Missouri

James N. Henderson, Esq.
La Roe, Winn & Moerman
Investment Building
Washington, D. C.

Gregory W. Rebman, Esq.
Rebman, La Tourette & Gunn
Suite 1230, Boatmen's Bank Building
St. Louis, Missouri

EXHIBIT A-2

REBMAN, LA TOURETTE & GUNN
ATTORNEYS AT LAW
SUITE 1230 BOATMEN'S BANK BUILDING
ST. LOUIS, MISSOURI 63102

June 17, 1966

Mr. Harold G. Pryce, Clerk
U. S. District Court
U. S. Customs & Courthouse
St. Louis, Missouri

Re: Mississippi Valley Barge Line Co., et al.
vs. United States of America et al.
No. 64C 3(1)

Dear Mr. Pryce:

Enclosed you will find an original and three copies of the Notice in connection with my Motion filed this day to require the Interstate Commerce Commission to show

cause. I am also enclosing 3 additional copies of the said Motion for the Court files.

Yours very truly,

/s/ G. M. REBMAN
G. M. Rebman

GMR:ik
encls.
cc: Hon. Nicholas Katzenbach
Hon. Donald P. Turner
Hon. Richard D. FitzGibbon, Jr.
Hon. Robert E. Ginnane
Hon. Betty Jo Christian
Hon. Ernest L. Keathley
Hon. Ernie Adamson
Mr. James Henderson

EXHIBIT A-3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action No. 64C 3(1)

MISSISSIPPI VALLEY BARGE LINE CO., AMERICAN COMMERCIAL LINES, INC. and UNION BARGE LINE CORPORATION,
Plaintiffs

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

PITTSBURGH TOWING COMPANY, *Intervenor.*

NOTICE

To: Hon. Nicholas Katzenbach, Attorney General of the United States, Department of Justice, Washington, D. C.

Hon. Donald P. Turner, Assistant Attorney General of the United States, Department of Justice, Washington, D. C.

Hon. Richard D. FitzGibbon, Jr., United States Attorney, Federal Building, 12th and Market Streets, St. Louis, Mo.

Hon. Robert E. Ginnane, General Counsel, Interstate Commerce Commission, Washington, D. C.

Hon. Betty Jo Christian, Attorney, Interstate Commerce Commission, Washington, D. C.

Hon. Ernest L. Keathley, Attorney, 748 Paul Brown Bldg., St. Louis, Missouri, 63101.

Hon. Ernie Adamson, Attorney, Aspen Hill, Middleburg, Va.

Notice is hereby given that the undersigned, attorney for Plaintiffs, will on the 1st day of July, 1966, at ten o'clock a.m. or as soon thereafter as the same can be heard, present and argue the attached motion.

/s/ G. M. REBMAN

G. M. Rebman
Rebman, LaTourette & Gunn,
1230 Boatmen's Bank Bldg.,
St. Louis 2, Missouri
GA 1-6010

EXHIBIT A-4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action No. 64C 3(1)

MISSISSIPPI VALLEY BARGE LINE CO., AMERICAN COMMERCIAL LINES, INC. and UNION BARGE LINE CORPORATION,
Plaintiffs

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

PITTSBURGH TOWING COMPANY, *Intervenor.*

MOTION TO REQUIRE DEFENDANT INTERSTATE COMMERCE COMMISSION TO SHOW CAUSE WHY IT SHOULD NOT BE CITED IN CONTEMPT

Come now Mississippi Valley Barge Line Co., American Commercial Lines, Inc., and Union Barge Line Corporation and move this Honorable Court to issue an order to the Interstate Commerce Commission directing it to show cause why said Interstate Commerce Commission should not be held in contempt of the order of this Court entered on the 25th day of March, 1966 in the above entitled cause, which said order is as follows:

"IT IS ORDERED, ADJUDGED AND DECREED:

1) That the Orders of the Defendant Interstate Commerce Commission dated September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965 are hereby set aside, annulled and suspended.

2) That the Defendant Interstate Commerce Commission is permanently enjoined from transferring water carrier certificate No. W-364 to Intervenor

Pittsburgh Towing Company, as authorized by said orders."

And for reason for this motion it is submitted that:

1. By order dated the 18th day of March, 1966, served May 5, 1966, which was after February 18, 1966, the filing and service date of the memorandum opinion of this Court, the Interstate Commerce Commission served its order which provides as follows:

> "*It is ordered,* That the orders of the Commission of September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965, in the above-entitled proceeding be, and they are hereby vacated and set aside;
>
> "*It is further ordered,* That the above-entitled proceeding be, and it is hereby, reopened for further consideration on the present record;
>
> "*And it is further ordered,* That this order shall be effective 75 days from the date of service."

A copy of said order of the 18th day of March, 1966 of the Interstate Commerce Commission, served May 5, 1966, is attached as Exhibit 1 to this Motion.

2. Said order would and does completely violate the order, judgment and decree of this Court entered on March 25, 1966, permanently enjoining the Interstate Commerce Commission from transferring Water Carrier Certificate No. W-364 to Pittsburgh Towing Company, in that the Interstate Commerce Commission has reopened the transfer proceeding in Finance Docket 21193 for "further consideration on the present record."

3. That while Pittsburgh Towing Company, intervenor herein, has filed its notice of appeal to the Supreme Court of the order, judgment and decree of this Court, said notice has not and does not vacate the order, judgment and decree of this Court, so as to enable the Interstate Commerce

Commission to further consider at this time pending said appeal the application matter in Finance Docket No. 21193 contrary to the order, judgment and decree of this Court.

4. The order of the Interstate Commerce Commission entered on the 18th day of March, 1966 and served on the 5th day of May was entered contrary to the action of the Commission taken on the 18th day of March, 1966 as per the attached certified copy of the minutes of a General Session of the Interstate Commerce Commission held on said date, which minutes are attached as Exhibit A hereto.

WHEREFORE movants pray this Honorable Court to issue its order directed to defendant Interstate Commerce Commission ordering and directing said defendant to show cause on or before the ... day of June, 1966, if any there be, why it should not be required to abide the order, judgment and decree of this Court entered on the 25th day of March, 1966, or be held in contempt of the aforesaid order of this Court.

JAMES M. HENDERSON
LA ROE, WINN & MOERMAN
Investment Building
Washington, D. C.

G. M. REBMAN
REBMAN, LA TOURETTE & GUNN
1230 Boatmen's Bank Bldg.,
St. Louis, Missouri 63102

Attorneys for:
Mississippi Valley Barge Line Company
American Commercial Barge Line Company
and Union Barge Line Corporation
Plaintiffs

EXHIBIT A-5

EXHIBIT 1

SERVICE DATE
MAY 5, 1966

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its offices in Washington, D. C., on the 18th day of March, A.D. 1966.

Finance Docket 21193

PITTSBURGH TOWING COMPANY
—CERTIFICATE TRANSFER—
CHARLES ZUBIK

It appearing, That on February 18, 1966, the United States District Court for the Eastern District of Missouri, Eastern Division, in Civil Action No. 64 C 3(1), *Mississippi Valley Barge Line Co.* v. *United States,* annulled the orders of the Commission of September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965, in the above-entitled proceeding, pursuant to which:

It is ordered, That the orders of the Commission of September 9, 1960, April 9, 1963, December 19, 1963 and March 19, 1965, in the above-entitled proceeding be, and they are hereby, vacated and set aside;

It is further ordered, That the above-entitled proceeding be, and it is hereby, reopened for further consideration on the present record;

And it is further ordered, That this order shall be effective 75 days from the date of service.

By the Commission.

H. NEIL GARSON,
Secretary

(SEAL)

EXHIBIT A-6

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 18th day of March, A.D. 1966.

Commissioners—JOHN W. BUSH, WILLIAM H. TUCKER, HOWARD G. FREAS, KENNETH H. TUGGLE, RUPERT L. MURPHY, LAURENCE K. WALRATH, ABE MCGREGOR GOFF, CHARLES A. WEBB, PAUL J. TIERNEY, VIRGINIA MAE BROWN, WILLARD DEASON.

MISSISSIPPI VALLEY BARGE LINE CO., ET AL.

v.

UNITED STATES, ET AL.

Civil Action No. 64 C 3(1), U.S.D.C., E.D. Mo.
(Finance Docket 21193)

Voted not to appeal from the decision of the United States District Court in Civil Action No. 64 C 3(1).

EXHIBIT A-7

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Civil Action No. 64C 3(1)

MISSISSIPPI VALLEY BARGE LINE CO., AMERICAN COMMERCIAL LINES, INC. and UNION BARGE LINE CORPORATION,
Plaintiffs

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

PITTSBURGH TOWING COMPANY, *Intervenor.*

WITHDRAWAL OF MOTION

Come now Plaintiffs and withdraw their motion to require the Interstate Commerce Commission to show cause why it should not be held in contempt of the Order of this Court entered on March 25, 1966.

/s/ G. M. REBMAN
G. M. Rebman
1230 Boatmen's Bank Bldg.,
St. Louis, Missouri 63102

Attorney for
Mississippi Valley Barge Line Co.,
American Commercial Lines, Inc.
and Union Barge Line Corporation
Plaintiffs